Petition

81-1531

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No. _____

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA,

Petitioner,

vs.

ROBERT CHARLES JACKSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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QUESTIONS PRESENTED FOR REVIEW

Does a state statute, providing that proof of a criminal defendant's refusal to submit to a chemical sobriety test at the time of his arrest may be admitted into evidence at the accused's trial for driving while intoxicated, violate the defendant's Fifth Amendment right against self-incrimination?

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No. ____

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA,

Petitioner,

vs.

ROBERT CHARLES JACKSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

The petitioner, the State of Montana, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Montana entered in this case.

OPINION BELOW

The Opinion of the Montana Supreme Court is reported at *State v. Jackson*, 38 St. Rptr. 1778, 637 P. 2d 1 (1981). A copy of the Montana Court's opinion appears in the Appendix hereto.

JURISDICTION

The opinion of the Montana Supreme Court was entered on November 2, 1981. A timely petition for rehearing was denied by a split court on December 14, 1981, and this petition for certiorari was filed within 60 days of that date. Accordingly, this petition is timely under 28 U. S. C. § 2101 (d) and Supreme Court Rule 20.4.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution and by Article II, § 25 of the Montana Constitution as well as sections 61-8-401 (1); 61-8-402 (1) and 61-8-404 (2), of the Montana Code Annotated:

U. S. Const., Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Mont. Const., Art. II, § 25:

No person shall be compelled to testify against himself in a criminal proceeding. No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction.

Montana Code Annotated:

61-8-401. Persons under the influence of alcohol or drugs. (1) It is unlawful and punishable as provided in 61-8-714 (1) for any person who is under the influence of:

(a) alcohol to drive or be in actual physical control of a motor vehicle upon the highways of this state;

(b) a narcotic drug to drive or be in actual control of a motor vehicle within this state; or

(c) any other drug to a degree which renders him incapable of safety driving a motor vehicle to drive or be in actual physicial control of a motor vehicle within this state.

61-8-402. Chemical blood, breath, or urine tests. (1) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of 61-8-401, to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested by a peace officer for driving or in actual physical control of a motor vehicle while under the influence of alcohol. The test shall be administered at the direction of a peace officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of alcohol. The arresting officer may designate which one of the aforesaid tests shall be administered.

61-8-404. Evidence admissible.

• • •

(2) If the person under arrest refused to submit to the test as hereinabove provided, proof of refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle upon the public highways while under the influence of alcohol.

STATEMENT OF THE CASE

An officer of the Bozeman City Police Department arrested defendant Robert Charles Jackson on June 6, 1980, for driving while intoxicated. The officer read the defendant his *Miranda* warnings and informed him of the requirements of Montana's implied consent law. Section 61-8-402(1) of the Montana Code Annotated [hereinafter cited as MCA] provides that anyone operating a motor vehicle on the state's highways shall be deemed to have given consent to a chemical test of his blood alcohol level if arrested for driving a motor vehicle under the influence of alcohol. Section 61-8-404(2), MCA, provides for admission of any refusal to submit to testing into evidence at any criminal proceeding arising out of acts alleged to have been committed while the person was driving a motor vehicle under the influence of alcohol. After affecting the arrest, the officer took defendant Jackson to the police station. Defendant then refused the officer's request that he take a breathalyzer test.

On June 20, 1980, the defendant was charged by information in district court in Montana's Eighteenth Judicial District with the offense of driving a motor vehicle while under the influence of alcohol, fourth offense, a mis-

demeanor, in violation of section 61-8-401, MCA. Defendant appeared in Court on June 30, 1980, and entered a plea of not guilty. A jury trial was scheduled for October 26, 1980.

On October 15, 1980, the defendant's attorney filed a motion in limine with the district court seeking to preclude the introduction at trial of any evidence of the defendant's refusal at the time of his arrest to submit to a breathalyzer test or any other chemical test to determine his blood alcohol level. That motion appears in the Appendix. In his motion, defendant contended that section 61-8-404 (2), MCA providing for automatic admission into evidence at trial of refusal to submit to a chemical sobriety test, unconstitutionally infringed on the defendant's "right to remain silent . . . guaranteed him by the United States and Montana Constitutions." The motion was argued orally on October 17, 1980. On the same day the district court granted defendant's motion without an opinion. In its order, the district court held section 61-8-404(2), MCA, unconstitutional "due to the split of authority of the various and respective states on the question of the constitutionality of . . . the statute."

The order of the district court appears in the Appendix.

The State then appealed the district court order granting the defendant's motion in limine to the Montana Supreme Court. The state argued on appeal that section 61-8-404(2), MCA, which provides for the admission into evidence at a trial for driving while intoxicated of proof of a defendant's refusal to take a chemical test, did not offend the accused's right against self-incrimina-

tion under the federal or state constitutions. The Supreme Court of Montana affirmed the order of the district court. Apparently following a well-established line of precedent that the state constitutional right of self-incrimination is coextensive with the corresponding federal right, the Montana court held that section 61-8-404(2), MCA, was facially violative of the federal and state guarantee against self-incrimination.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. No Adequate Independent State Grounds Preclude Review By This Court of the Decision Below.

In a 4-3 split opinion, the majority of the Montana Supreme Court held in the present case that the admission into evidence under section 61-8-404(2), MCA, of defendant's refusal to submit to a breathalyzer test violated the accused's rights against self-incrimination under both the Fifth Amendment to the United States Constitution and Article II, section 25, of the Montana Constitution—the similarly-worded state guarantee against self-incrimination. The majority concluded that evidence of a refusal to take a sobriety test was inherently testimonial. 637 P. 2d at 3-5. It also concluded that section 61-8-404(2), MCA, by its nature, unconstitutionally compelled such a refusal. 637 P. 2d at 4

This Court has held that its appellate jurisdiction over state court judgments does not extend to the review of federal questions where the state court decision is sup-

ported by an independent, non-federal ground, adequate in itself to support the judgment. *Fox Film Corporation v. Muller,* 296 U.S. 207 (1935); *Enterprise Irrig. Dist. v. Farmer's Mut. Canal Co.,* 243 U.S. 157, 163-64 (1917); *Murdock v. City of Memphis,* 20 Wall 590 (U.S. 1875). However, the Montana Supreme Court's reliance on Article II, section 25 of the Montana Constitution, is not, under the decisions of this Court, an independent state ground which would preclude review. A non-federal ground may be non-independent because it is "interwoven" with federal law. *See Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945); *Standard Oil Co. v. Johnson,* 316 U.S. 481, 483 (1942); *State Tax Comm'n. v. Van Cott,* 306 U.S. 511 (1939); *Flourny v. Wiener,* 321 U.S. 253, 263 (1944) (Frankfurter, J. dissenting). Or a state ground may be non-independent because the state court has made its applicability dependent on federal constitutional principles. *See Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 568 (1977); *United Airlines v. Mahin,* 410 U.S. 623, 630-31 (1973); *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 120 (1924); *Cf. Patterson v. Alabama,* 294 U.S. 600, 606-07 (1935) (implying that the state court might have intended to make the applicability of a state procedural law dependent on the Supreme Court's construction of the federal constitutional right implicated in the case).

The state grounds put forward by the Montana Supreme Court are non-independent in both senses. In a long line of decisions, the Montana Court has held that the protection afforded by Montana's constitutional guarantee against self-incrimination is co-extensive with the protection afforded by the similarly-worded provision of

the federal constitution. *State v. Finley,* 173 Mont. 162, 164-65, 566 P. 2d 1119, 1121 (1977); *State v. Armstrong,* 170 Mont. 256, 260, 552 P. 2d 616, 619 (1976); *State v. Anderson,* 156 Mont. 122, 125, 476 P. 2d 780, 782 (1970). In *Finley,* the Montana Court declared: "The opinions of the United States Supreme Court . . . delineate the maximum breadth of the privilege against self-incrimination in Montana." *Id.* at 1121. In the present case, the Montana Court neither overruled nor disapproved, expressly or impliedly, that well-established precedent. In fact, the Montana Court interpreted the reach of Montana's constitutional provision by expressly referring to and relying on decisions of this Court construing the intent and scope of the Fifth Amendment. The Montana Court cited *Doyle v. Ohio,* 426 U.S. 610 (1976), as support for its holding that "under our [state] constitution . . . if a communication of refusal . . . involves the defendant's consciousness of the facts and operation of his mind, the communication is testimonial in nature." 637 P. 2d at 4-5. It also expressly relied on this Court's statement in *Murphy v. Waterfront Comm'n. of New York Harbor,* 378 U.S. 52, 55 (1964), that "our preference for an accusatorial rather than an inquistorial system of justice; . . . our sense of fair play which dictates 'a fair state—individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load' . . . is often 'a protection to the innocent.'" 637 P. 2d at 5. Relying on a statement by this Court in *Hoffman v. United States,* 341 U.S. 479, 486 (1951), the Montana Court also stated that "[t]he United States Supreme Court has declared that the privilege against self-incrimination must be liberally construed in favor of the accused . . . and we

must also liberally construe Article II, § 25 of our own Constitution." 637 P. 2d at 5.

It is not at all uncommon, nor unreasonable for a state court to decide that a provision in the state constitution was intended by its framers to mean within the state what a corresponding and similarly-worded clause of the national constitution means nationally, and for it to defer to the interpretations given to the federal provision by the United States Supreme Court. H. Hart and H. Wechsler, *The Federal Courts and the Federal System*, 178-83 (2d Ed. 1973); Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 309-10 & n. 80 (1963). Where a state court in interpreting its own constitution has voluntarily chosen to adopt federal constitutional interpretations of a corresponding federal constitutional right, there is no danger of developing a dual system of state law and no risk of increasing federal-state friction when the state court decisions are reviewed by the federal judiciary.

In *Minnesota v. Nat. Tea Co.*, 309 U.S. 551 (1940), this Court vacated the judgment below and remanded the case for clarification where it was not clear whether the lower court's decision rested on federal or non-federal grounds. This Court indicated that it would clearly have had jurisdiction if the court below had unequivocally stated that it felt bound to follow federal constitutional principles or if the state court had outrightly declared its independence from this Court's decisions. *Id.* at 556. The present case is much different. The Montana Court has repeatedly avowed its dependence on federal law. In the case at bar it has expressly relied on decisions of this Court to construe the scope and intent of Montana's right

against self-incrimination. The state grounds of the decision are, therefore, not independent. This Court's appellate jurisdiction clearly permits review of the decision.

B. The Montana Supreme Court's Decision on the Federal Question Conflicts with the Decisions of Other State Courts of Last Resort and of the Federal Courts of Appeal.

As noted by Mr. Justice White in his dissent to this Court's dismissal of *Thomas v. New York*, 444 U.S. 891 (1979), the state courts are split on the question "whether admission into evidence of one's refusal to submit a blood test to determine inebriation is contrary to the Fifth Amendment's prohibition of compelled testimonial incrimination." Most state courts that have decided the issue have upheld against constitutional attack the admission into evidence of the fact of a defendant's refusal to submit to a chemical sobriety test. *E.g., Hill v. State*, 366 So. 2d 318 (Ala. 1979); *People v. Thomas*, 46 N.Y. 2d 100, 412 N.Y.S. 2d 845, 385 N.E. 2d 584 (1978), appeal dismissed 444 U.S. 891 (1979); *Commonwealth v. Robinson*, 229 Pa. Super. 131, 324 A. 2d 441 (1974); *State v. Meints*, 189 Neb. 264, 202 N.W. 2d 202 (1972); *State v. Holt*, 261 Iowa 1089, 156 N.W. 2d 884 (1968); *People v. Sudduth*, 55 Cal. Rptr. 393, 421 P.2d 401 (en banc 1966). The courts of other states, however, have decided that the Fifth and Fourteenth Amendments require that evidence of refusal be held inadmissible. *E.g., State v. Adams*, 247 S.E. 2d 475 (W. Va. 1978); *Dudley v. State*, 548 S.W. 2d 706 (Tex. Cr. App. 1977); *Andrew v. State*, 297 Minn. 260, 212 N.W. 2d 863 (1973), cert. den. 419 U.S. 881 (1974); *Johnson v. State*, 125 Ga. 607, 188 S.E. 2d 416 (1972); *Gay v. City of Orlando*, 202 So. 2d 896 (Fla. D.C. App.

1967), cert. den. 390 U. S. 956 (1968). In addition, the decision of the Montana Supreme Court in the case at bar directly conflicts with decisions of the two federal courts of appeals which have considered whether admission of refusal to take a chemical sobriety test is offensive to the Fifth Amendment's protection against compelled testimonial evidence. The Second and the Ninth Circuits have both held that admission of such a refusal into evidence at trial does not violate a defendant's rights under the Fifth and Fourteenth Amendments. *Welch v. District Court of Vermont Unit,* 594 F. 2d 903 (2d Cir. 1979); *Newhouse v. Miserly,* 415 F. 2d 514 (9th Cir. 1969), cert. den. 397 U. S. 966 (1970).

These conflicts in authority justify granting certiorari to review the decision below. The disparate results reached by lower courts are attributable in part to the conflicting inferences they have drawn from this Court's decision in *Schmerber v. California,* 384 U. S. 757 (1966) and its progeny. In *Schmerber,* this Court held that the privilege against self-incrimination protected "an accused only from being compelled to testify against himself" or from providing the state "with evidence of a testimonial or communicative nature," *Id.* at 761, but that it offered no protection against compulsion to produce real or physical evidence by submitting "to fingerprinting, photographing, or measurements" or by speaking for identification, appearing in court, assuming a particular stance, or making a particular gesture, *Id.* at 764. In a now famous footnote the Court declined to decide whether admission into evidence of the defendant's refusal to submit to a breathalyzer test contravened the Fifth Amendment because the accused had not properly preserved the question for appeal. *Id.* at 765 n. 9. Nevertheless, the Court did

state that "general Fifth Amendment principles, rather than the particular holding of *Griffin* [*v. California,* 380 U. S. 609 (1965)] would be applicable to these circumstances, see *Miranda v. Arizona,* [384 U. S. 436], at p. 468, n. 37" *Id.* The same footnote discussed on accused who incriminates himself "when told that he would have to be tested." *Id.* The Court stated in this regard that if the State "wishes to compel persons to such attempts to discover evidence, [it] may have to forego the advantage of any *testimonial* products of administering the test. . . ." *Id.*

While most courts recognize that *Schmerber* did not pass on the constitutionality of admitting a refusal into evidence, *e.g. Robinson,* 324 A. 2d at 449; *Adams,* 247 S. E. 2d at 476; *Andrews,* 212 N. W. 2d at 864, some read footnote nine as strongly implying that a refusal to submit to a sobriety test constitutes testimonial evidence within the purview of the Fifth Amendment privilege, *e.g., Dudley,* 548 S. W. 2d at 707; *see Gay,* 202 So. 2d at 898. Other courts perceive in *Schmerber* an intimation that a refusal to take a blood test is not a testimonial "statement," but rather "conduct indicating a consciousness of guilt." *E.g. Newhouse,* 415 F. 2d at 518. Some courts read footnote nine's directive to analyze the admissibility of refusal evidence under "general Fifth Amendment principles" as precluding reliance on the rule of *Griffin v. California,* but as including the principles of *Miranda. E.g., Dudley,* 548 S. W. 2d at 707; *see Newhouse,* 415 F. 2d at 518. Other decisions interpret the footnote as rejecting the rules of both *Miranda* and *Griffin. E.g. Robinson,* 324 A. 2d at 449. Only a clarifying opinion by this Court can assure uniformity of analysis by the lower courts.

The decisions holding that refusal to submit to chemical testing of blood alcohol content is compelled, testimonial evidence within the Fifth Amendment's protection are not only wrongly decided, they seriously impede the good-faith efforts of law enforcement to abate the grave danger to public safety presented by the intoxicated driver. The physical and psychological disturbance of the individual involved in obtaining a breath sample is apt to be significantly less than that involved in extracting a blood sample, an evidence gathering technique approved in *Schmerber*. The value of objective scientific data of intoxication to supplement fallible human observations of behavior seemingly symptomatic of intoxication is undisputable. Juries have come to expect such cogent proof of intoxication in trials on charges of driving while intoxicated. The court decisions forbidding the state from introducing evidence that a defendant has refused to submit to testing precludes the prosecutor from explaining the state's failure to introduce scientific evidence of intoxication. The jurors are left with the impression that the state's case is a weak one. In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient and accurate system of detection, enforcement and, hence, prevention. *See, Breithaupt v. Abram*, 352 U. S. 432, 439 (1957). The state's ability to inform the jury of an accused's refusal to submit to testing plays an integral role in an effective system of enforcement of our drunk driving laws and prevention of the escalating carnage on our highways.

The decisions holding refusal to take a sobriety test to be unconstitutional either assume without analysis

that such a refusal is testimonial, *e. g., Gay,* 202 So. 2d at 898, or regard refusal—in whatever form it may occur from a shake of the head to a simple "no"—as the functional equivalent of a confession to the effect that " '[b]ecause I fear . . . the examination will produce evidence of my guilt, I refuse to permit it,' " *Jackson,* 637 P. 2d at 3; *Andrew,* 212 N. W. 2d at 864. The mere fact that a refusal may be verbal, however, does not make it testimonial. *Robinson,* 324 A. 2d at 449. Although a defendant's negative response does contain certain communicative qualities by definition, that alone does not render the refusal "sufficiently testimonial for purposes of the [Fifth Amendment] privilege." *Fisher v. United States,* 425 U. S. 391, 411 (1976). A federal court of appeals has specifically held that evidence of a defendant's refusal to cooperate in giving a handwriting exemplar, including his efforts to disguise his handwriting, was admissible as against the claim that the act of refusal was itself testimonial in nature. *United States v. Wolfish,* 525 F. 2d 457 (2d Cir. 1975), cert. den. 453 U. S. 1059 (1976).

The courts that disallow admission of the fact of a defendant's refusal adopt a strained rationale in holding that the state has "compelled" the refusal. They equate compulsion with putting the defendant to what the courts perceive as an "unfair" choice between surrendering physical evidence of inebriation by submitting to an unpleasant scientific test or seeing the equally incriminating evidence of refusal admitted at trial. *Jackson,* 637 P. 2d at 4; *Andrew,* 212 N. W. 2d at 864. In reality, however, it can scarcely be contended that the police, who seek evidence from the sobriety test itself, will tend to coerce parties into refusing to take tests in order to produce evidence of

refusal. *People v. Ellis,* 55 Cal. Rptr. 385, 389, 421 P. 2d 393, 397 (en banc 1966). Any compulsion that exists is not to refuse the test; the compulsion is to take it. *People v. Thomas,* 385 N. E. 2d at 588.

Because a person's breath or blood constitutes real or physical evidence rather than testimonial or communicative evidence, a person under arrest has no constitutional right to refuse to take a chemical sobriety test. *Schmerber; Welch,* 594 F. 2d at 904. For that reason, the majority of courts considering the issue have concluded that the introduction of evidence of a defendant's refusal to take a chemical sobriety test does not violate his or her right against self-incrimination. *See, e. g., State v. Gardner,* 52 Or. App. 663, 629 P. 2d 412, 416 (1981); *Welch,* 594 F. 2d at 905; *Newhouse, Thomas, Robinson, Sudduth.* Refusal is merely conduct that is circumstantial evidence of guilt in much the same way as escape, flight, false alibi, demeanor, attitude, and other acts of the defendant. *See, e. g., Robinson, Sudduth.* "By acting like a guilty person, a person does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind." *Ellis,* 55 Cal. Rptr. at 389-90, 421 P. 2d at 397-98.

A need for guidance from this Court is evident from the split of authority existing in lower court decisions. In the interests of effective law enforcement and uniform administration and interpretation of the law, this Court should decide the issue presented.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Montana.

Respectfully submitted,

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Appendix

APPENDIX

No. 80-405

IN THE SUPREME COURT OF MONTANA

1981

THE STATE OF MONTANA,

Plaintiff and Appellant,

vs.

ROBERT CHARLES JACKSON,

Defendant and Respondent.

Appeal from: District Court of the Eighteenth Judicial District, In and for the County of Gallatin. Honorable Joseph B. Gary, Judge presiding.

Counsel of Record:

For Appellant:

Hon. Mike Greely, Attorney General, Helena, Montana

Dennis Dunphy argued, Assistant Attorney General, Helena, Montana.

Donald White, County Attorney, Bozeman, Montana

Michael J. Lilly argued, Deputy County Attorney, Bozeman, Montana

For Respondent:

Goetz and Madden, Bozeman, Montana

James Goetz argued, Bozeman, Montana

Submitted: February 19, 1981

Decided: November 2, 1981

(Filed November 2, 1981)

Mr. Justice Daniel J. Shea delivered the Opinion of the Court.

The State appeals from an order of the Gallatin County District Court which declared section 61-8-404, MCA unconstitutional and suppressed all evidence of the defendant's refusal to submit to a breathalyzer sobriety test after he was arrested for driving while under the influence of intoxicants. The primary question on appeal is whether the refusal is testimonial in nature so that the fact of refusal cannot be admitted into evidence. We hold that such refusal is testimonial in nature and that to admit evidence of the fact of refusal would violate the defendant's Fifth Amendment privilege as guaranteed by the United States Constitution, and would further violate defendant's privilege as guaranteed by Art. II, § 25 of the Montana Constitution.

A second question raised, but which we do not reach here because of our holding, is defendant's contention that admission of evidence of his refusal to take the breathalyzer test violates his right to due process because he was not told the consequences of his refusal. Without specifically setting forth the actual basis for its decision, the trial court granted the motion in limine, and thus suppressed all evidence of the defendant's refusal to take the breathalyzer test.

Shortly after the defendant's arrest on June 6, 1980, for driving while under the influence of alcohol, he was taken to the Bozeman police station and asked to submit to a breathalyzer and to perform certain physical coordination exercises. He performed the coordination exercises, but refused to submit to the breathalyzer test. The

police recorded all of his activities on videotape, including his refusal to take the breathalyzer test.

Before trial, the defendant filed a motion in limine to suppress all evidence of his refusal to submit to the breathalyzer test as well as any evidence of license suspension resulting from that refusal. Section 61-8-404 (2), MCA, states that if one refuses to submit to a sobriety test, the fact of refusal can be admitted into evidence against him. However, section 61-8-402 (3), MCA, permits a person to refuse a sobriety test. Defendant argued that admitting evidence of his refusal to take the sobriety test would violate his privilege against self-incrimination and his right to due process. The trial court agreed and granted the motion in limine.

Although the defendant concedes he has no federal constitutional right to refuse a sobriety test (see Schmerber v. California (1966), 384 U. S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 903), he contends that section 61-8-404 (2), MCA, in one breath gives him a right to refuse the sobriety test, but in the next breath permits the fact of refusal to be admitted as evidence against him. This statutory right of refusal is testimonial or communicative in nature, he argues, and was compelled by the State. He further argues that evidence of his refusal violates his privilege against being compelled to testify against himself, and is equivalent to allowing prosecutorial comment on his right to remain silent.

The State argues, on the other hand, that the refusal is not testimonial or communicative in nature, and therefore it is not protected by the privilege against self-incrimination. The State cites a line of cases which holds

that the refusal to take a sobriety test is conduct to be viewed as circumstantial evidence of guilt, in the same way that escape, flight, and false alibi are viewed. For example, see Commonwealth v. Robinson (1974), 229 Pa. Super. 131, 324 A. 2d 441 (refusal is circumstantial evidence from which the jury can infer his state of mind); People v. Sudduth (1966), 65 Cal. 2d 543, 55 Cal. Rptr. 393, 421 P. 2d 401, cert. denied (1967), 389 U. S. 850 (where refusal might operate to suppress rapidly-disappearing evidence of intoxication, it should not be encouraged as a device to escape prosecution and does not qualify for Fifth Amendment protection); State v. Durrant (1963), 55 Del. 510, 188 A. 2d 526 (evidence of refusal reflects defendant's attitude toward the crime and is a matter of weight for the jury to decide). The fact is, however, that this line of cases fails to recognize that escape, flight, and false alibi are not compelled by the State. Under section 61-8-404 (2), supra, the defendant is *compelled* to choose between providing physical evidence against himself by submitting to the sobriety test and providing testimonial evidence against himself by refusing to submit to the sobriety test. That is no choice at all.

The statute which recognizes the right to refuse the test, section 61-8-404, MCA, also provides for the admissibility of the fact of refusal:

> "(1) Upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor, evidence of the amount of alcohol in the person's blood at the time of the act alleged as shown by a chemical analysis of his blood, breath, or urine is admissible.

"(2) If the person under arrest refused to submit to the test as hereinabove provided, proof of refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor."

Many states have held that admitting evidence of a defendant's refusal to take a sobriety test violates the privilege against self-incrimination because the effect of admitting evidence of the defendant's refusal is equivalent to compelling the defendant to testify against himself. See, for example, State v. Adams (W. Va. 1978), 247 S. E. 2d 475; Dudley v. State (Tex. Cr. App. Ct. 1977), 548 S. W. 2d 706; People v. Rodriguez (1975), 80 Misc. 2d 1060, 364 N. Y. S. 2d 786; Application of Baggett (Okla. 1974), 531 P. 2d 1011; State v. Andrews (1973), 297 Minn. 260, 212 N. W. 2d 863, cert. denied (1974), 419 U. S. 881; Johnson v. State (1972), 125 Ga. 607, 188 S. E. 2d 416; Gay v. City of Orlando (Fla. D. C. App. 1967), 202 So. 2d 896, cert. denied (1968), 390 U. S. 956. We agree with these decisions that not only does admission of such evidence violate the defendant's privilege against self-incrimination, but also that the admission of such evidence is not always reliable and is highly prejudicial to the defendant, in effect forcing him to take the witness stand to explain why he refused to take the test, or to bear the consequences of not explaining.

Without question, the fact of refusal to take a sobriety test will be considered as circumstantial evidence of the defendant's belief that the test results would have been incriminating, and without question that is the argument any prosecutor would make to the jury. Effectively, the

evidence of refusal has substantially the same effect in the prosecution's case as the evidence the prosecution sought to obtain through the resisted examination. Evidence of a defendant's refusal, whether expressed verbally or by physical resistance, is relevant in its testimonial aspect as the equivalent of the statement, "Because I fear that the test will produce evidence of my guilt, I refuse to take the test." 78 Yale L. J. 1074, 1082-1085 (1969). And the likelihood is strong that the jury will ascribe undue weight to the defendant's refusal.

We analogize this to a situation where the State offers a defendant a polygraph examination, but the defendant refuses it. Surely, the State would like to argue to the jury that it had offered the defendant a polygraph examination, but that he refused. And just as surely, we doubt that any court would not find this to be an improper invasion into the defendant's privilege against self-incrimination. In either situation, the inference left for the jury is that the defendant displayed consciousness of his guilt. Such evidence is inadmissible if it is compelled by the State.

In addition, a defendant may have valid reasons for refusing a breathalyzer test—reasons which do not reflect his consciousness of guilt. Yet, if the fact of his refusal is admitted into evidence, he will be compelled to either take the witness stand to explain his refusal or to take the chance that the jury will infer that he was in fact under the influence of alcohol. Several cases illustrate situations in which the defendant refused to submit to the test for reasons other than fear that the test would yield evidence of guilt: State ex rel. Baumert v. Municipal Court of Phoenix (1978), 119 Ariz. 142, 579 P. 2d 1112

(failure to take test was due to defendant's asthma); State v. Adams (W. Va. 1978), 247 S. E. 2d 475 (defendant may fear the test itself or may distrust the procedure or the competency of the testers); State v. Paschal (1961), 253 N. C. 795, 117 S. E. 2d 749 (defendant feared he would have to pay for the test); Engler v. State (Okla. Crim. 1957), 316 P. 2d 625 (bona fide doubts as to reliability of test); and Columbus v. Mullins (1954), 162 Ohio St. 419, 123 N. E. 2d 422 (defendant desired presence of a doctor). In each of these cases, it was held that admitting evidence of defendant's refusal to take the test violated his privilege against self-incrimination.

The likelihood of prejudice to a defendant increases if he had an innocent reason for refusing the test, but, for other reasons, exercises his privilege not to take the witness stand and testify why he did not submit to the test. On one hand, the defendant would be entitled to an instruction that the jury is not to make inferences against the defendant because of his failure to take the witness stand. See, Griffin v. California (1965), 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, reh. denied (1965), 381 U. S. 957. On the other hand, the jury would be instructed that it could consider all circumstantial evidence including the defendant's failure to submit to the test, even though the defendant had the statutory right to refuse the test. The effect, however, of the statutory right to refuse the test is that it provides an unfair choice: the defendant may either voluntarily submit to the test or he may refuse, and, in the eyes of the jury, admit that he could not successfully pass the test. It is manifestly unfair to give an individual a right to refuse the test, and then to impose substantially the same penalty for refusing as that for submitting to the test.

The statutory right to refuse to take the test is perhaps a legislative expression that citizens should be protected from a distasteful struggle to forceably obtain physical evidence from their bodies. In *Schmerber,* supra, the United States Supreme Court held that the privilege against self-incrimination protects a defendant from being compelled to testify against himself, or to otherwise provide evidence of a testimonial or communicative nature. The Court ruled, however, only that the results of a blood test administered to a defendant despite his objection were admissible because blood test results were real, physical evidence, rather than evidence of a testimonial nature.

The issue of whether a refusal to submit to a breathalyzer test could be admitted as evidence without violating a defendant's Fifth Amendment privilege was also raised in *Schmerber,* but the Court refused to rule on that issue because the defendant had not preserved that issue for appeal. Even so, the Court indicated in a now famous footnote that the issue would be controlled by general Fifth Amendment principles rather than on the narrow ground that prosecutorial comment on the defendant's refusal amounted to comment on his choice to exercise his Fifth Amendment privilege not to take the witness stand. *Schmerber,* supra.

The issue is also controlled by Art. II, § 25 of our own constitution, which provides that "No person shall be compelled to testify against himself in a criminal proceeding." The issue involves a communication that is testimonial in nature, and we must resolve the issue by applying Art. II, § 25. Clearly, to permit evidence of defendant's refusal to take the breathalyzer test would violate not only the United States Constitution, but also our own constitution.

In State v. Finley (1977), 173 Mont. 162, 566 P. 2d 1119, we held that a defendant's privilege against self-incrimination was not violated by admitting into evidence a videotape recording of his post-arrest words and actions. We decided that the tape had not been introduced for the incriminating content of the words uttered by the defendant, but rather for the purpose of aiding the jury in understanding the testimony of the witnesses who had observed the defendant's unsteady walk and his slurred speech after his arrest. We specifically noted that the videotape did not contain incriminating responses to interrogation by the police. But the same situation does not exist here. It is obvious that defendant's refusal is inherently self-incriminating because it carries a strong inference of guilt—the prosecutor would surely argue that defendant's refusal to take the test was prompted only by his knowledge that the test results would reveal his intoxication, and therefore incriminate him.

We hold under our own constitution, that if a communication of refusal, whether written, verbal, or otherwise, involves the defendant's consciousness of the facts and the operation of his mind in expressing it, the communication is testimonial in nature. A defendant's silence or negative reply to an officer's request which calls for an immediate reply is clearly an overt communication of the defendant's thoughts in response to the request. Doyle v. Ohio (1976), 426 U. S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91. It is the act of refusal that is pertinent and suggestive of guilt, rather than the way in which it is communicated. Under our constitution, the privilege against self-incrimination forbids any compulsory communication of an accused person's thoughts, whether by acts or words spoken, and the fact that it does not extend its protection

to forbid the compulsory exhibition of physical characteristics does not nullify the protection it does provide.

In deciding this issue, we are mindful of a statement of the United States Supreme Court in Murphy v. Waterfront Commission of New York Harbor (1964), 378 U.S. 52, 55, 84 S.Ct. 1594, 1596-1597, 12 L.Ed. 2d 678, 681, where the Court cogently spelled out that the nature of our criminal justice system reflects:

> "[O]ur preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load,' (citations omitted); our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' (citations omitted); . . . and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"

The United States Supreme Court has declared that the privilege against self-incrimination must be liberally construed in favor of the accused, Hoffman v. United States (1951), 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118, 1124, and we must also liberally construe Art. II, § 25, of our own constitution.

We affirm the decision of the trial court suppressing evidence of defendant's refusal to take the breathalyzer test, and at his trial, we direct that the prosecution shall not directly or indirectly submit evidence to the jury that

the defendant was offered but refused to take a breathalyzer test.

Affirmed and remanded for further proceedings.

/s/ Daniel J. Shea
Justice

We Concur:

Chief Justice

/s/ Gene B. Daly
Frank B. Manison
John C. Sheehy

Justices

Mr. Chief Justice Frank I. Haswell dissenting:

I respectfully dissent. I would hold the refusal of the defendant to submit to a sobriety test admissible in evidence and remand the case to the District Court of Gallatin County for trial. In so doing I find no denial of the constitutional privilege against self-incrimination under either the state or federal constitutions.

Montana's implied consent law provides in relevant part:

"*Chemical blood, breath, or urine tests.*

"(1) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent . . . to a chemical test of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested by a peace officer for driving . . . a motor vehicle while under the influence of intoxicating liquor . . .

". . .

"(3) If a person under arrest refuses upon the request of a peace officer to submit to a chemical test . . . none shall be given, but the division, upon the receipt of a sworn report of the peace officer that he had reasonable grounds to believe the arrested person had been driving . . . upon the public highways of this state while under the influence of intoxicating liquor and that the person had refused to submit to the test upon the request of the peace officer, shall suspend the license or driving privilege of such person . . . for a period of 60 days . . ." Section 61-8-402, MCA.

"*Evidence admissible.*

". . .

"(2) If the person under arrest refused to submit to the test as hereinabove provided, proof of refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving . . . a motor vehicle upon the public highways while under the influence of intoxicating liquor. . . . Section 61-8-404, MCA.

This law was enacted by the Montana legislature in 1971. The journal of the Senate Judiciary Committee indicates that at that time, Montana was one of only four states without this law.

The District Court held unconstitutional the provision that proof of refusal to submit to a sobriety test was admissible in evidence "due to the split of authority of the various and respective states on the question of the constitutionality of this portion of the statute." In so holding, the District Court denied the statute the presumption of constitutionality to which the statute was entitled. McClanathan v. Smith (1980), — Mont. —, 606 P. 2d 507, 37 St. Rep. 113.

Initially we must determine if evidence of refusal to submit to a chemical test for sobriety is relevant, i. e. whether it has sufficient probative value on the issue of intoxication to be admitted to evidence. In my view the better reasoned decisions hold that refusal to take a chemical test for intoxication may indicate the defendant's fear of the results of the test and his consciousness of guilt, and if the defendant has some other explanation for the refusal, such explanation can be considered by the jury in determining whether the refusal is to be construed as consciousness of guilt. For example, see Hill v. State (1979), — Ala. —, 366 So. 2d 318; Campbell v. Superior Court (1971), 106 Ariz. 542, 479 P. 2d 685; People v. Conterno (1959), 170 C. A. 2d 817, 339 P. 2d 968; State v. Durrant (1963), 55 Del. 510, 188 A. 2d 526; State v. Bock (1958), 80 Idaho 296, 328 P. 2d 1065; State v. Benson (1941), 230 Iowa 1168, 300 N. W. 275; Gardner v. Commonwealth (1954), 195 Va. 945, 81 S. E. 2d 614. It would appear to me that such evidence could support an inference of consciousness of guilt and that the jury is the proper body to determine what weight should be given such evidence.

There is yet another reason why this evidence is relevant. The State is entitled to show the jury why it produced no scientific evidence of intoxication to counteract the inference that the evidence of intoxication introduced by the State was weak. A common jury instruction given in Montana reads as follows:

> "You are instructed that evidence is to be considered not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore, that if weaker and less satisfactory evi-

dence is offered, when it appears that stronger and more satisfactory [evidence] was within the power of the party, the evidence offered should be viewed with distrust." MJIG No. 1.06.

In this sense evidence of refusal is relevant, material and probative on the weight of the evidence introduced by the State, entirely apart from its relevance concerning consciousness of guilt.

Most of the decisions denying materiality and probative value to a refusal to take a sobriety test are based on the reasoning that a refusal may be dependent upon reasons other than consciousness of guilt and therefore is not probative as to intoxication. One case has even held that evidence of refusal is inadmissible because such evidence simply is not probative. Duckworth v. State (Okla. Crim. 1957) 309 P. 2d 1103. In my view evidence of refusal is probative and material for the reasons above stated and should be presented to the jury for their consideration rather than excluded from evidence by the judge as a matter of law. Evidence as to whether a person's refusal to take the sobriety test is due to his asthma, fear of the test itself, distrust of the procedure, distrust of the competency of the testers, fear that he would have to pay for the test, doubts as to the test's reliability, or a desire that his personal physician be present at the time the test is conducted is better weighed by the jury rather than being excluded by the judge as not relevant or probative.

The Fifth Amendment of the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U. S. Const. Amend. V. This provision is applicable in state court criminal proceedings through the due process

clause of the Fourteenth Amendment of the United States Constitution. This constitutional privilege protects a defendant only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. Schmerber v. California (1966), 384 U.S. 757. The United States Supreme Court in *Schmerber* went on to say:

> "[B]oth federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber,* 384 U.S. at 764.

The Montana Constitution provides: "No person shall be compelled to testify against himself in a criminal proceeding." 1972 Mont. Const., Art. II, § 25. This Court has previously held that the Montana constitutional privilege against self-incrimination is no greater than that contained in the federal constitution.

> "[T]he Montana constitutional guarantee of the privilege against self-incrimination affords no broader protection to an accused than does the Fifth Amendment. State v. Armstrong, 170 Mont. 256, 552 P. 2d 616. The opinions of the United States Supreme Court, therefore, delineate the maximum breadth of the privilege against self-incrimination in Montana." State v. Finley (1977), 173 Mont. 162, 164-165, 566 P. 2d 1119, 1121.

The majority holding that a communication of refusal, whether written, verbal, or otherwise involving the defendant's consciousness of the facts and the operation of his mind in expressing it is testimonial in nature and violates his privilege against self-incrimination, extends far beyond any pronouncement of the United States Supreme

Court to date. It extends the breadth of Montana's constitutional provision beyond that afforded by the United States Constitution and overrules *sub silento* this Court's own interpretation of Montana's constitutional privilege against self-incrimination.

At least two federal courts of appeal have held that allowing the admission into evidence of proof that defendant refused to take a breath test does not violate his privilege against self-incrimination. Welch v. District Court of Vermont Unit, Etc. (2d Cir. 1979), 594 F. 2d 903; Newhouse v. Misterly (9th Cir. 1969), 415 F. 2d 514. The courts of at least 16 other states have likewise so held: Hill v. State (1979), — Ala. —, 366 So. 2d 318; Campbell v. Superior Court (1971), 106 Ariz. 542, 479 P. 2d 685; People v. Sudduth (1966), 55 Cal. Rptr. 393, 421 P. 2d 401; State v. Durrant (1963), 55 Del. 510, 188 A. 2d 526; State v. Holt (1968), 261 Iowa 1089, 156 N. W. 2d 884; State v. Smith (1978), — La. —, 359 So. 2d 157; People v. Taylor (1977), 73 Mich. App. 139, 250 N. W. 2d 570; State v. Meintz (1972), 189 Neb. 264, 202 N. W. 2d 202; People v. Thomas (1978), 46 N. Y. 2d 100, 385 N. E. 2d 584; State v. Flannery (1976), 31 N. C. App. 617, 230 S. E. 2d 603; City of Westerville v. Cunningham (1968), 15 Ohio St. 2d 121, 239 N. E. 2d 40; Commonwealth v. Robinson (1974), 229 Pa. Super. 131, 324 A. 2d 441; State v. Smith (1956), 230 S. C. 164, 94 S. E. 2d 886; Gardner v. Commonwealth (1954), 195 Va. 945, 81 S. E. 2d 614; State v. Brean (1978), 136 Vt. 147, 385 A. 2d 1085; State v. Albright (1980), 98 Wis. 2d 663, 298 N. W. 2d 196. At least five other states with statutes the same or similar to Montanas have been held constitutional, *Robinson, Hill, Smith, Holt,* and *Thomas,* supra.

Wigmore indicates that the privilege against self-incrimination does not prohibit inspection or proof of bodily features or conditions because such are nontestimonial in nature and list the following types or categories of this nonprohibited evidence:

1. Fingerprinting, measuring and photographing a suspect,

2. Imprinting a foot or shoe mark for identification;

3. Examination of a suspect's body for identifying characteristics;

4. Examination of a suspect's private parts for evidence of disease or crime;

5. Extraction of a substance from a suspect's body such as urine, a blood sample, or breath;

6. Requiring a suspect to put on a hat, glasses, shoes or clothing for purposes of identification;

7. Requiring a suspect to speak for voice identification;

8. Requiring a suspect to write for identification;

9. Requiring a suspect to appear in court, stand, assume a stance, walk, or make a particular gesture;

10. Requiring a suspect to be examined for sanity.

Wigmore on Evidence, Vol. 8, Section 2265, McNaughton Revision 1961.

A federal court of appeal has held that evidence of a defendant's refusal to cooperate in giving a handwriting exemplar, including his efforts to disguise his handwriting, was admissible as against the claim that the act of refusal was itself testimonial in nature. United States v. Wolfish

(2d Cir. 1975), 525 F. 2d 457, cert. denied (1976) 423 U. S. 1059. The analogy drawn by the majority with reference to polygraph tests is inapposite inasmuch as polygraph tests are not admissible in evidence and therefore the refusal to take the same would not be probative. The United States Supreme Court has held that there is no constitutional right to refuse to submit to a blood test, and the results of such test taken against an accused's will are admissible at trial, *Schmerber*, supra.

The majority of states considering the question have held that admission in evidence of refusal to submit to a chemical test for intoxication does not violate the privilege against self-incrimination; this result is reached on the ground that an accused has no constitutional or statutory right to refuse a chemical test, and since the results of a test taken against his will are admissible, evidence of refusal would also be admissible. See Hill v. State, supra. Conversely, most states that recognize a statutory right to refuse a chemical test do not allow evidence of such refusal as a general rule, e. g., State v. Parker (1976), 16 Wash. App. 632, 558 P. 2d 1361; State v. Adams (1978), — W. Va. —, 247 S. E. 2d 475.

A refusal by itself is not a testimonial communication within the prohibition of the privilege against self-incrimination but rather it is the act of refusal, i.e., conduct, which gives rise to inferences that a jury is entitled to consider. The following language describes the reasoning behind this conclusion:

> "Nor was defendant's refusal to 'display his voice' itself a testimonial communication. It was circumstantial evidence of consciousness of guilt, and like similar evidence, such as escape from custody . . . false alibi . . . flight . . . suppression of evidence . . .

> and failure to respond to accusatory statements when not in police custody . . . its admission does not violate the privilege. Moreover, as in the foregoing examples, the evidence did not result from a situation contrived to produce conduct indicative of guilt. . . . By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind." People v. Ellis (1966), 55 Cal. Rptr. 385, 421 P. 2d 393, 397-398.

The majority proceed on what I consider a false premise—that Montana's implied consent statute grants defendant a statutory right to refuse to take the sobriety test. The majority make no analysis of the statute or the rules of statutory construction.

In my view the plain and unambiguous language of the statute belies this construction. I find no language in the statute, express or implied, granting a person a statutory right of refusal. The language plainly says that a person operating a motor motor vehicle on the public highway gives his consent to a sobriety test if arrested for driving a vehicle while under the influence of intoxicating liquor; if he refuses, no test shall be given, but proof of such refusal is admissible in any criminal action arising out of his acts alleged to have been committed while driving under the influence. The majority fail to point out any language in the statute granting a statutory right of refusal. It has long been the law in Montana that the intention of the Legislature must first be determined from the plain meaning of the words used, and if interpretation of the statute can be so determined the courts may not go further and apply any other means of interpretation. State, Etc. v. District Court, Etc. (1979), — Mont. —, 591 P. 2d 656, 36 St. Rep. 489;

Dunphy v. Anaconda Company (1968), 151 Mont. 76, 438 P. 2d 660, and cases cited therein. Where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the Court to construe. State, Etc. v. District Court, Etc, supra; Doull v. Wohlschlager (1963), 141 Mont. 354, 377 P. 2d 759; Montana Chap., Elec. Con. Ass'n v. State Bd. of Ed. (1960), 137 Mont. 382, 352 P. 2d 258. The function of the Court is simply to ascertain and declare what in terms or substance is contained in the statute and not to insert what has been omitted or omit what has been inserted. Section 1-2-101, MCA.

Montana's implied consent law adopts a statutory scheme whereby a person using the public highway impliedly consents to a chemical testing of his blood, breath or urine when lawfully arrested for an offense involving the operation of a motor vehicle while under the influence of intoxicating liquor. The Act contains a statutory determination of intoxication according to the per cent by weight of alcohol found in a person's blood. The Act provides procedures for the suspensior of a person's driver's license for 60 days in the event he refuses to submit to such test. The Act expressly provides for admission in evidence of refusal to submit to the test.

An act of this type was first enacted in New York in 1953 and arose out of dissatisfaction with alternative proposals protecting against intoxicated drivers by either making chemical tests compulsory or requiring actual consent in the form of a written waiver made at the time of application for a driver's license. The New York Act was not intended to provide a right to refuse a chem-

ical test even though by the terms of the act the police must acquiesce in a refusal and may not compel a person to submit to a test against his will.

This type of statute provides for mandatory consent with a freedom of refusal to prevent unseemly struggles that are likely to arise when police and citizens fail to appreciate the import of a common purpose. An act of this type does not contemplate a *per se* right of refusal, but rather an acquiescence in refusal in the posture of avoiding violent conflicts. The New York courts have interpreted the act in this matter:

> "[T]his 'right' of refusal is not really a right in the sense of a fundamental personal privilege, but, rather, was merely an accommodation to avoid a distasteful struggle to forcibly take blood." People v. Paddock (1971), 29 N. Y. 2d 504, 272, N. E. 2d 486.

Other courts have reached the same result in interpreting substantially similar acts. *Campbell,* supra; *Bush v. Bright* (1968), 264 Cal. App. 2d 788, 71 Cal. Rptr. 123. Acts of this type do not grant a right of refusal since they exact a penalty for refusal in the form of suspension of the person's driver's license and in some states, including Montana, they extract the further penalty of expressly allowing evidence of refusal to be admitted at trial. Accordingly, I would not interpret Montana's implied consent law as providing a right of refusal.

The contention that a defendant may have valid reasons for refusing to take the test which have nothing to do with the consciousness of guilt loses much of its vitality because such reasons, if they exist in fact, can easily be proven by the testimony of third persons such as the police officers, doctors, technical experts on the relia-

bility of such tests, and other competent witnesses without the necessity of the defendant taking the stand himself if he chooses not to do so.

The construction of Montana's implied consent law to grant a driver the statutory right of refusal provides any defendant in such a case with an unconscionable advantage tantamount to acquittal. It enables a defendant to point out to the jury that the State (which must prove his guilt beyond a reasonable doubt) has only the weakest of evidence as no scientific evidence of intoxication was produced; at the same time it denies the State the right to show that its failure to produce scientific evidence was due to the defendant's refusal to submit to a sobriety test. We have many times given lip service to the observation that the object of a criminal trial is to establish the truth, e.g., State v. Peters (1965), 146 Mont. 188, 405 P. 2d 642. The majority today have made this impossible by placing a premium on nondisclosure of relevant facts to the jury.

For the foregoing reasons, I would hold the evidence of refusal to submit to a sobriety test admissible without violation of the defendant's privilege against self-incrimination under the federal or state constitutions.

/s/ Frank I. Haswell
Chief Justice

We concur in the foregoing dissent of the Chief Justice.

/s/ Hugh J. Wilbur

/s/ John Conway Harrison
Justices

IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF GALLATIN

No. 4285-A

THE STATE OF MONTANA,

Plaintiff,

vs.

ROBERT CHARLES JACKSON,

Defendant.

ORDER

(Filed October 17, 1980)

The Motion In Limine having been presented to the Court and argued by counsel for the State and counsel for the defendant and due to the split of authority of the various and respective states on the question of the constitutionality of this portion of the statute,

IT IS HEREBY ORDERED that the Motion In Limine is hereby granted.

DATED this 17th day of October, 1980.

/s/ Joseph B. Gray
District Court Judge

Copy to: Leanne Schraudner-Dept. Co. Atty.
James Goetz

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 80-405

THE STATE OF MONTANA,

Plaintiff and Appellant,

vs.

ROBERT CHARLES JACKSON,

Defendant and Respondent.

ORDER

(Filed December 14, 1981)

PER CURIAM:

The petition for rehearing is denied.

DATED this 14th day of December, 1981.

/s/ Daniel J. Shea

/s/ Frank B. Manison

/s/ Gene B. Daly

/s/ John C. Shelby
Justices

We would grant the petition for rehearing.

/s/ Frank I. Haswell
Chief Justice

/s/ John Conway Harrison

/s/ Hugh J. Wilbur
Justices

IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF GALLATIN

No. 4285-A

THE STATE OF MONTANA,

Plaintiff,

vs.

ROBERT CHARLES JACKSON,

Defendant.

MOTION IN LIMINE

COMES NOW, ROBERT CHARLES JACKSON, Defendant, by and through his counsel, below-subscribed, and states as follows:

1. That he is charged by the State of Montana with the crime of driving while under the influence of intoxicating liquor on the 6th day of June, 1980.

2. That his jury trial, Judge Gary presiding, has been set for October 27, 1980.

3. That, on the evening Defendant was arrested, he was requested to take a chemical breathalyzer test and failed to do so.

4. That, on the evening of June 6, 1980, Defendant was ordered by law enforcement officers of the City of Bozeman to perform certain physical coordination tests and that he complied with such order.

5. That Defendant's failure to take said breathalyzer test and Defendant's compliance with the order to

perform certain acts designed to demonstrate physical coordination were videotaped at the police station of the City of Bozeman.

6. That it is the understanding of the below-subscribed counsel that the prosecutor intends to introduce into evidence at Defendant's trial the said videotape which shows the physical coordination tests and shows Defendant's failure to take the breathalyzer test.

WHEREFORE, Defendant moves as follows:

That the Court enter an Order to preclude introduction of, or alternatively, to suppress, any and all evidence of said Defendant's failure to submit to the breathalyzer, or any other chemical test, and that said Order preclude or suppress that videotape or that portion which affects such failure to take such test. Defendant specifically moves that the following be excluded from trial:

1. Any and all statements relating to failure or refusal of said Defendant to take breathalyzer test or any chemical test whether such statements are evidenced by writing, videotape, or testimony of witnesses to be offered:

2. Any part of any police report or other official document on which is stated that said Defendant "refused tests", or words to that effect.

3. Any and all evidence of license suspension resulting from said failure of Defendant to take any chemical test.

This Motion is made upon the following grounds and for the following reasons:

1. Section 61-8-404, M.C.A. 1979 (formerly R.C.M., 1947, Section 32-2142.2[c]), which provides for the automatic admission of refusal to take chemical tests in a DWI proceeding is unconstitutional because:

(a) It infringes Defendant's right to remain silent and his right to due process of law guaranteed him by the United States and Montana Constitutions.

(b) Defendant was not apprised that the fact of refusal would be automatically admitted into evidence against him in the event that he refused such test, all in violation of Defendant's rights under the Montana and United States Constitutions.

Dated this 15th day of October, 1980.

Goetz & Madden

P. O. Box 1322
Bozeman, Montana 59715

By /s/ James H. Goetz

Attorney for Defendant

Opposition

Office - Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1531

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

* * * * * * *

THE STATE OF MONTANA,

Petitioner,

- VS -

ROBERT CHARLES JACKSON,

Respondent.

* * * * * * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF IN OPPOSITION FOR RESPONDENT

JAMES H. GOETZ
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No. 81-1531

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE STATE OF MONTANA,

Petitioner,

-vs-

ROBERT CHARLES JACKSON,

Respondent.

ARGUMENT

I. REVIEW BY THIS COURT IS PRECLUDED BECAUSE THE JUDGMENT BELOW WAS BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

The Montana Supreme Court held that Section 61-8-404 M.C.A. was in violation of Respondent's Fifth Amendment privilege against self-incrimination as guaranteed him by the United States Constitution. It also held that Respondent's privilege

as guaranteed him by Art. II, Sec. 25 of the Montana Constitution was violated.[1/] If a decision by a State Court, based in part on Federal Constitutional considerations, is also based on an independent and adequate state ground, this Court has no jurisdiction. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

The question is whether the Montana Supreme Court intended to rest its decision independently on the Montana Constitution. Delaware v. Prouse, 440 U.S. 648, 652 (1979).

[1/] The Court stated:

> "We hold that such refusal is testimonial in nature and that to admit evidence of the fact of refusal would violate the defendant's Fifth Amendment privilege as guaranteed by the United States Constitution, and would further violate defendant's privilege as guaranteed by Art. II, §25 of the Montana Constitution."

637 P. 2d 1; App. 2, Petition for Certiorari.

In the opinion below, after determining that Section 61-8-404 M.C.A. violated the Fifth Amendment, the Montana Supreme Court turned to the Montana Constitution:

> "The issue is also controlled by Art. II, Sec. 25 of our own Constitution, which provides that 'no person shall be compelled to testify against himself in a criminal proceeding'. The issue involves a communication that is testimonial in nature, and we must resolve the issue by applying Art. II, §25. Clearly, to permit evidence of defendant's refusal to take the breathalyzer test would violate not only the United States Constitution, but also our own Constitution."[2/]

637 P. 2d 4; App. 8, Petition for Certiorari.

[2/] The Montana Supreme Court also stated:

> "We hold under our own constitution that if a communication of refusal, whether written, verbal or otherwise, involves the defendant's consciousness of the facts and the operation of his mind in expressing it, the communication is testimonial in nature."

637 P. 2d 4,5; App. 9, Petition for Certiorari.

This language indicates that the decision is based on independent and adequate state grounds. Accordingly, review should be denied.

Petitioner argues that, while state grounds are asserted in the Court's opinion, such grounds are not independent because the Montana Supreme Court has made the applicability of the Montana self-incrimination provision "dependent on Federal Constitutional principles." Petition for Certiorari, p. 7.[3/] While it is true that prior to the decision below, the Montana Court interpreted Montana's self-incrimination provision co-extensively with that of the Fifth

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[3/] See, Delaware v. Prouse, supra: "This is one of those cases where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe... its own law in the manner it did.' Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568...(1977)."

Amendment, the decision below sets forth the grounds essentially in the alternative. For that reason, review by this Court would not be appropriate.

II. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW.

The Petitioner correctly states that there is a split among the states on the questions presented (see, pp. 10, 11, Petition for Certiorari) and that two Federal Circuits have ruled contrary to the position of the Montana Supreme Court. Welch v. District Court of Vermont Unit, 594 F. 2d 903 (2nd Cir. 1979); Newhouse v. Misterly, 415 F. 2d 514 (9th Cir. 1969), cert. den., 397 U.S. 966 (1970).

This Court, however, has, in the past, denied certiorari on this issue. Gay v. City of Orlando, 202 So. 2d 896 (Fla. D.C. App. 1967), cert. den., 390 U.S. 956 (1968); Newhouse v. Misterly,

supra. See also, dismissal in Thomas v. New York, 444 U.S. 891 (1979) (Justices White and Brennan dissenting).

There would appear to be no reason why this issue presents any more compelling reason for review than it did before.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted this 16 day of March, 1982.

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By: James H. Goetz
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, JAMES H. GOETZ, do hereby certify that a true and accurate copy of the above and foregoing was duly served upon

all counsel of record by depositing same, postage prepaid, in the United States Post Office this 16th day of March, 1982.

JAMES H. GOETZ

SUBSCRIBED AND SWORN to before me, a Notary Public for the State of Montana, this 16th day of March, 1982.

Notary Public for the State of Montana
Residing at Bozeman
My commission expires: 5-22-84

(S E A L)